

Spangenberg



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pacific Consolidated Industries

File: B-228724, B-228724.2

Date: December 3, 1987

DIGEST

1. An award to the offeror, who proposed the lowest price, was properly made without discussions since the agency reasonably found this would result in the lowest overall cost to the government.
2. Even assuming RFP instructions required the inclusion of first article costs in a line item with a short delivery schedule and the protester, but not the awardee, based its price for the first article on this short delivery schedule, the protester was not prejudiced where the RFP did not require delivery of the first article within the shorter period and the protester's cost for meeting the short delivery period is \$275,000 more than for a longer delivery period, since the low offeror's price, including the cost of the first article, is \$2,350,000 lower than the protester's total price.

DECISION

Pacific Consolidated Industries has filed two protests against the award of a contract to Cosmodyne Inc., pursuant to request for proposals (RFP) No. F41608-86-R-3365, issued by the San Antonio Air Logistics Center, Department of the Air Force, for a quantity of semi-trailer mounted liquid oxygen-nitrogen generating and charging plants.

The protests are dismissed in part and denied in part.

The RFP as amended requested fixed prices for line item 0001AA, "First Article Test Procedure/Documentation;" line item 0001AB, "First Article Test Report;" line item 0001AC "Production Articles;" and various line items, not pertinent here, for spare parts and other data. The RFP provided that line item 0001AA was required to be delivered on or before 150 days after receipt of the order and line item 0001AB on or before 405 days after receipt of the order. There was no separate line item for the first article unit. The RFP stated that award would be made to

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the lowest evaluated responsive, responsible offeror. The price of each offeror would be determined by adding the lot prices of line items 0001AA, 0001AB, certain designated quantities in line item 0001AC, and the other line items. Cosmodyne submitted the lowest priced proposal of \$6,055,670 and Pacific the second lowest priced proposal at \$8,407,898. Award was made without discussions to Cosmodyne.

As noted above, Pacific has filed two protests against this procurement. In Pacific's initial protest it contended that the award was improperly made without conducting discussions; that the RFP evaluation factors were not clear, which could lead to a defective evaluation; and that the RFP specifications do not comply with the Department of Defense (DOD) requirements for the design and acquisition of nuclear, biological and chemical (NBC) contamination-survivable systems. Pacific's second protest is that inconsistent and prejudicial advice was given by the contracting officer concerning where the costs of the first article unit were to be included in the offerors' proposals and that Cosmodyne's proposal may be unacceptable for improperly pricing, or failing to price, the first article item.

Pacific's protest concerning the clarity of the RFP evaluation criteria and DOD's NBC survivability requirements concerns alleged improprieties in the RFP apparent prior to the closing date for receipt of proposals. Since Pacific's protest of these matters was filed months after receipt of proposals under the RFP, it is untimely under our Bid Protest Regulations and thus will not be considered by our Office. 4 C.F.R. § 21.2(a)(1) (1987). Consequently, these protest bases are dismissed.

Pacific's protest that it was improper for the Air Force to make award without conducting discussions has no merit. Low price was the award selection criterion under the RFP which specifically warned of the possibility of an award without discussions. The award was made without discussions to the offeror who proposed the lowest price. Consequently, the Air Force reasonably found that it was clear from the low price and full and open competition, receipt of five offers, that acceptance of Cosmodyne's initial proposal without discussions would result in the lowest overall cost to the government. 10 U.S.C. § 2304(a)(2)(A)(ii) (Supp. III 1985); The Marquardt Co., B-224289, Dec. 9, 1986, 86-2 C.P.D. ¶ 660; Automated Industries and Associates, Inc., B-225181.2, Dec. 3, 1986, 86-2 C.P.D. ¶ 637. This protest basis is denied.

Pacific's contention that because of the flawed and ambiguous evaluation criteria the agency could not find that

an award without discussions would necessarily result in the lowest overall cost to the government is simply a restatement of its untimely protest against the alleged ambiguous evaluation criteria and thus will not be considered.

Pacific's protest concerning the pricing of the first article unit was filed during the pendency of the initial protest when Pacific was apprised by a third offeror, Henderson Sales and Service, Inc., that Henderson had included the costs of its first article in line item 0001AB pursuant to the advice of the contracting officer. Pacific claims that not only does the RFP require these costs to be included in line item 0001AA, but that the contracting officer confirmed to Pacific that these costs should be included in line item 0001AA. Pacific also protests that if Cosmodyne placed its first article costs under a line item other than line item 0001AA, or if it did not otherwise account in its proposed price for these costs, then its proposal is unacceptable since the RFP required that the costs be included in line item 0001AA.

Although the Air Force and Cosmodyne dispute the timeliness of the second protest, contending that it is a belated attack on the ambiguousness of the RFP, they misconstrue Pacific's protest, which concerns whether the offerors' pricing responses were in accordance with the RFP, a matter which Pacific protested within 10 days after being apprised that Henderson had been given and relied upon allegedly inconsistent advice concerning the pricing of the first article units. Therefore, this protest is timely filed under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2).

The Air Force states that it makes no difference whether the costs for production of the first article were placed in line item 0001AA or 0001AB since the prices were simply added together in determining the lowest offeror. However, Pacific states that the placement of these costs was material since the required period of performance for line item 0001AA is only 150 days after receipt of the order while line item 0001AB has a 405-day period of performance. Pacific states, without rebuttal, that it is much more expensive--if not impossible for many potential sources--to manufacture a first article unit within 150 days. Pacific also contends that since there was no specific designated blank in the RFP schedule for the first article unit, it may be that Cosmodyne did not price this item and expects to be compensated for it in a modification to the contract after award.

The record shows that Henderson asked the Air Force if it was acceptable to include the costs for the first article in

line item 0001AB, that the Air Force responded affirmatively, and that Henderson did include these costs in line item 0001AB.

Cosmodyne claims that it made no inquiry and received no advice other than that contained in the RFP about where to include its first article production costs, but that its pricing of the unit is in accordance with the RFP. Cosmodyne has specifically refused to disclose where it included these costs in its proposal; Cosmodyne's affiant states that the first article production costs are included in its proposal in line item(s) other than line item 0001AC.^{1/} Cosmodyne's line item 0001AA price is substantially less than its line item 0001AB price, but it is not clear from our review of the record that the total first article costs are included in Cosmodyne's line item 0001AB.

Pacific included its first article costs in line item 0001AA. However, an affidavit included in Pacific's initial protest, contending that the RFP evaluation criteria were ambiguous, states that the contracting officer advised it prior to submission of proposals that it did not matter under the RFP where these costs were included. In its second protest, contending that the RFP clearly required certain pricing of the first article units, Pacific submitted an affidavit stating that it was also told by the contracting officer to place the first article costs in line item 0001AA. Consequently, Pacific should have been aware when it submitted its proposal that the Air Force interpreted the RFP as permitting offerors to include these costs in either line item 0001AA or 0001AB.

Nevertheless, Pacific protests that the RFP clearly required the inclusion of these costs in line item 0001AA and that the first article production units were required to be completed within 150 days after receipt of the order.^{2/} In making this contention, Pacific primarily relies upon clause F900, which was included in the RFP by amendment after Pacific initially asked the Air Force where the first

^{1/} Cosmodyne claims that its pricing strategy is confidential and irrelevant to the resolution of this protest.

^{2/} Ironically, in Pacific's untimely initial protest of the evaluation criteria, it contends that the RFP is ambiguous concerning where the first article costs are to be included.

article costs were to be included.^{3/} That clause, entitled "First Article-Final Disposition," provided for the shipment of the first article unit to the government as a manufacturing standard and references the first article unit as being line item 0001AA. Pacific states that since the first article unit was to be produced in connection with line item 0001AA, the RFP required these costs to be included in that line item because the "Integrity of Unit Prices" clause of the Federal Acquisition Regulation, 48 C.F.R. § 52.215-26 (1986), which was incorporated into the RFP, required costs associated with a particular line item to be included in that line item.

Pacific's protest centers on its assumption that the line item in which the first article costs are included in an offeror's proposal governs the required delivery date of the first article unit. However, even assuming it was more appropriate under the RFP instructions to include the costs of the first article unit in line item 0001AA, we agree with the Air Force and do not interpret the RFP as requiring the first article unit to be completed within 150 days after receipt of the order as contended by Pacific. All line item 0001AA specifically requires is that the first article test plan be completed in that time. There is no indication in the record that the production units must be fabricated in order to prepare the test plan. Moreover, there is no stated period of performance in the RFP for production of the first article unit. The reference to line item 0001AA in clause F900 would not legally bind a contractor to deliver the first article within 150 days. Therefore, in the absence of a more specific RFP requirement that the first article unit be produced at the same time as the test plan, we do not believe the Air Force could legally enforce any such delivery requirement. However, clause F900 and line item 0001AB make it clear that the contractor must produce a first article unit and deliver it to the government, and that the unit must be completed to allow sufficient time for the first article tests, and reports thereon, to be completed by 405 days after receipt of the order.

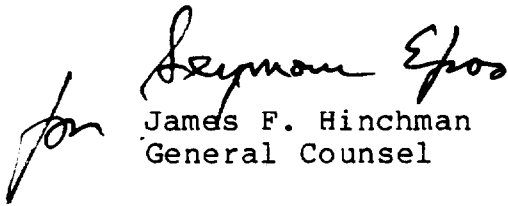
Where, as here, a protester alleges a violation of the "Integrity of Unit Prices" clause by the awardee, it must show that it was prejudiced; that is, that its price would have been lower than the awardee's price, if both the protester and the awardee submitted prices on the same

^{3/} The record does not support Pacific's contention that clause F900 was added in specific response to Pacific's inquiry concerning the pricing of the first article; that clause does not address where the costs of the first article are to be included in the RFP schedule.

basis. Keco Industries, Inc., 64 Comp. Gen. 48 (1984), 84-2 C.P.D. ¶ 491; Kitco, Inc., B-221386, Apr. 3, 1986, 86-1 C.P.D. ¶ 321. Since the Air Force permitted offerors to include the costs for production of the first article in either line item 0001AA or 0001AB and there is no specific period of performance for the production of the first article unit, proposed prices should not have been affected by the offerors' choice of where to place these costs. Furthermore, Pacific states that if it had known it could include the costs for production of the first article unit in line item 0001AB instead of line item 0001AA, its proposed costs would have been \$275,000 less because of the longer period of performance. However, Cosmodyne's total price is \$2,352,228 less than Pacific's price. Consequently, Pacific was not prejudiced, even if it was the only offeror who presumed that the first article unit was required to be produced within 150 days.

Finally, although Pacific speculates that Cosmodyne may not have included any costs for the first article unit in its proposal and expects to recoup these costs in a contract modification, Cosmodyne has sworn in an affidavit that it has included such costs in its proposed price.

Accordingly, the protests are dismissed in part and denied in part.

for
James F. Hinchman
General Counsel